No. 19-5161

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
& NOAH BOOKBINDER,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:18-cv-00076-RC

MOTION FOR INVITATION TO PARTICIPATE AS *AMICUS CURIAE* BY PROFESSORS OF ADMINISTRATIVE LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 29(b)(2) and D.C. Circuit Rule 35(f), the Professors Kimberly Wehle, Seth Davis, Miriam Galston, Jeffrey S. Lubber, Sidney A. Shapiro, Peter L. Strauss, and Daniel Walters request an invitation to participate as *amicus curiae* in support of plaintiffs-appellants' petition for rehearing en banc. Appellants consent to this motion to participate as *amicus curiae* in support of plaintiffs-appellants' petition. Appellee takes not position on this motion.

Amici are professors of law who teach and write in the field of administrative law. They have an interest in how this Court's decision will affect administrative law, especially the judicial review of agency action. While individual *amici*'s views on judicial review of agency action may differ, all agree that the panel opinion's decision that *Heckler v. Chaney*, 470 U.S. 821 (1985), can preclude judicial review of the Federal Election Commission's dismissal of complaints brought under the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, is incorrect and should be reheard en banc.

The Professor's proposed brief as *amicus curiae* in support of plaintiffs-appellants' petition for rehearing en banc is attached to this motion.

Respectfully submitted this 30th day of June, 2021.

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BRIEF OF PROFESSORS OF ADMINISTRATIVE LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

STATEMENT OF INTEREST*

Amici are professors of law who teach and write in the field of administrative law. They have an interest in how this Court's decision will affect administrative law, especially the judicial review of agency action. While individual *amici*'s views on judicial review of agency action may differ, all agree that the panel opinion's decision that *Heckler v. Chaney*, 470 U.S. 821 (1985), can preclude judicial review of the Federal Election Commission's dismissal of complaints brought under the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.*, is incorrect. These professors join this brief as *amici curiae*:

Kimberly Wehle, Professor of Law, Baltimore University School of Law;

Seth Davis, Professor of Law, University of California, Berkeley School of Law;

Miriam Galston, Associate Professor of Law, George Washington University Law School;

Jeffrey S. Lubber, Professor of Practice in Administrative Law, Washington College of Law, American University;

Sidney A. Shapiro, Frank U. Fletcher Chair in Law, Wake Forest University School of Law;

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* *Amici Curiae* state that no party's counsel authored this brief in whole or in part, and that no one other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Peter L. Strauss, Betts Professor of Law Emeritus, Columbia School of Law;

Daniel Walters, Assistant Professor of Law, Penn State Law.

These professors' titles and university affiliations are provided for identification purposes only.

ARGUMENT

The Federal Election Campaign Act ("the Act" or "the FECA") permits "[a]ny person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, [to] file a complaint with the Commission." 52 U.S.C. § 30109(a)(1). A party "aggrieved by an order of the Commission dismissing" its complaint can seek review of the Commission's order in the United States District Court for the District of Columbia. *Id.* § 30109(a)(8)(A). Despite this clear statutory text, the panel opinion, relying on this Court's prior decision in *Citizens for Resp. & Ethics in Washington v. FEC* ("*CHGO*"), 892 F.3d 434 (D.C. Cir. 2018), held that dismissals that purportedly rest even partially on "prosecutorial discretion" are not subject to judicial review. *Citizens for Resp. & Ethics in Washington v. FEC ("New Models"),* 993 F.3d 880, 886, 889 (D.C. Cir. 2021).

The panel's decision is incorrect and should be reconsidered. The appropriate question presented for the Court is whether the Act's special statutory review provision permits judicial review of dismissals of complaints based in part on enforcement discretion. The statute *does* permit review by its plain language. Thus, the panel opinion's and *CHGO*'s contrary holdings should be reconsidered.[1]

[1] Appellants' petition for rehearing en banc also argues that judicial review cannot be precluded based on a minority of the Commission's invocation of prosecutorial discretion. Although this *amicus* brief does not address that issue, the Appellants' petition is right to raise it.

I. The FECA's plain language permits review of the dismissal of a complaint at the reason-to-believe stage.

Generally, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab's v. Gardner*, 387 U.S. 136, 140 (1967). And, to determine Congress' purpose, the Court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). When the plain text of the statute "directly addresse[s] the precise question at issue[,]" as it does here, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The FECA sets forth parties' rights to file complaints and the Commission's duties to review and investigate complaints. 52 U.S.C. § 30109. Under the Act, "[a]ny person who believes a violation of [the FECA] . . . has occurred, may file a complaint with the Commission." 52 U.S.C. § 30109(a)(1). If at least four commissioners find there is "reason to believe" a violation happened, then the Commission "shall make an investigation" of the alleged violation. *Id.* § 30109(a)(2). If the Commission does not find "reason to believe" a violation occurred, the Commission often dismisses the complaint based on the reason-to-

believe vote. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546.

"Any party aggrieved by an order of the Commission dismissing" its complaint may seek review of the Commission's order in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). The statute makes no carve-outs or exceptions for dismissals that contain certain buzzwords or ostensible rationales. *Cf. Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 697 (2021) ("The phrase 'any final decision' is broad, and it reflects Congress' intent to define the scope of review 'expansively.'"). On review, the district court "may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days[.]" 52 U.S.C. § 30109(a)(8)(C). A dismissal is "contrary to law" if the Commission "dismissed the complaint as a result of an impermissible interpretation of the Act" or if the Commission's "dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

The statutory language just reviewed is clear and unequivocal, and it resolves this case. The Act provides for judicial review of a specific type of agency action—"an order of the Commission dismissing a complaint filed" by the party seeking review. 52 U.S.C. § 30109(a)(8)(A). This provision has long been

interpreted to permit review when the Commission dismisses a complaint based on its lack of belief that a violation occurred. *E.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 30–31 & n.3 (1981). The Act provides no reason for treating dismissals purportedly based on "prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement" differently, *see New Models*, 993 F.3d at 886, and it includes no limitations or exceptions to review. And whether agency action is reviewable depends on its formal character, not on the reasons for the dismissal. *See I.C.C. v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 281 (1987) (holding that the agency's "formal action, rather than its discussion, . . . is dispositive" of whether the action is reviewable).

The Supreme Court's holding in *FEC v. Akins*, 524 U.S. 11 (1998), confirms that the Act permits review of ***any*** dismissal, including those purportedly based on prosecutorial discretion. There, the Court rejected the Commission's argument that *Heckler v. Chaney*, 470 U.S. 821 (1985), precluded review under the FECA and held instead that the Act "explicitly indicates" that the Commission's exercise of enforcement discretion is subject to judicial review. *Akins*, 524 U.S. at 26. Even the dissenting justices agreed that the Act "conferr[ed] upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party." *Id.* at 29–30 (Scalia, J., dissenting). *Akins* controls here.

Yet despite the clear statutory text (and an on-point Supreme Court case interpreting that text), the panel, relying on *CHGO*, held that dismissals of complaints based on "prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement" are unreviewable. *New Models*, 993 F.3d at 886. That holding deviates from the Act's plain text permitting review of dismissal orders without exception, and should be rejected. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (rejecting the "invitation to override Congress' considered choice by rewriting the words of" the Clean Water Act's judicial review provisions).

II. *Heckler* does not preclude judicial review of the Commission's dismissal of the FECA complaints purportedly based on prosecutorial discretion.

Along with its failure to heed the FECA's plain language, the panel's decision is erroneous because it grafts a case interpreting a statutory exception to judicial review under a different statute—the Administrative Procedure Act—onto the FECA, supplanting the FECA's own judicial review provisions.

A. By its terms, *Heckler*'s presumption against review applies only when review of a non-enforcement decision is sought under the APA.

Relying mainly on *Heckler*, *CHGO*, and the APA, the panel opinion held that dismissal of a complaint that references prosecutorial discretion in a footnote within a 31-page substantive analysis is not subject to judicial review. *New Models*, 993 F.3d at 888. This conclusion lacks support in the law.

The panel's holding conflates judicial review brought under the APA and review under an organic statute's special statutory review procedure. *See* 5 U.S.C. § 703; *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (holding that the APA does not "provide additional judicial remedies in situations where Congress has provided special and adequate review procedures"). *Heckler* is an interpretation of the APA, particularly 5 U.S.C. § 701(a)(2). *E.g.*, *Heckler*, 470 U.S. at 823.

By contrast, judicial review of the Commission's dismissal orders is under the FECA's special statutory review provision, 52 U.S.C. § 30109(a)(8)(A). The panel's conclusion that the "FECA cannot alter the APA's limitation on judicial review unless it does so expressly[,]" *New Models*, 993 F.3d at 889, thus has it backwards. The APA's review under 5 U.S.C. §§ 701–706 is foundationally triggered if review under special statutory review provisions in an organic statute like the FECA is unavailable. That is not the case here.

In addition, the dismissal of a complaint under the FECA is not like nonenforcement of a statute by a prosecutor who declines to bring an indictment against a possible defendant. Instead, as the Act's text shows, it is a final agency action on the aggrieved party's complaint, and hence reviewable. And the Supreme Court has said that *Heckler* does not apply when an agency denies a complaint or petition made through a formal procedure otherwise authorized by Congress. *Cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) (distinguishing *Heckler* because

the EPA had issued "denials of petitions for rulemaking which . . . the affected party had an undoubted procedural right to file in the first instance").

B. Even if *Heckler* applies, the FECA rebuts its presumption against judicial review of prosecutorial discretion decisions under the APA.

Even if *Heckler*'s presumption against judicial review of nonenforcement actions applies outside the APA, the Supreme Court clarified that the presumption "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833. As "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability[,]" the Court pointed to *Dunlop v. Bachowski*, 421 U.S. 560 (1975), which interpreted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481 *et seq. Heckler*, 470 U.S. at 833. That statute's relevant section "provided that, upon filing of a complaint by a union member, the Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation has occurred he shall bring a civil action." *Id.* (quoting 29 U.S.C. § 482) (cleaned up). According to *Heckler*, that language "clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.* at 834.

The FECA contains similar language that likewise shows Congress' "intent to circumscribe agency enforcement discretion." *Id.* The Act provides that the Commission "shall make an investigation" when there is "reason to believe" that

someone violated or is likely to violate the Act and provides for judicial review of whether dismissals of complaints are "contrary to law." 52 U.S.C. § 30109(a)(2), (8)(C). Courts are well acquainted with this standard. *E.g.*, *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) ("When reviewing an FEC decision not to prosecute, the standard to be applied is whether the FEC has acted 'contrary to law.'"). By providing for "contrary to law" review of nonenforcement decisions, the Act shows Congress' "intent to circumscribe agency enforcement discretion" and "has provided meaningful standards for defining the limits of that discretion[.]" *Heckler*, 470 U.S. at 834. Thus, even if *Heckler*'s presumption against judicial review applies, the FECA overcomes the presumption under *Dunlop*.

Yet, according to *CHGO*, even if reason-to-believe dismissals are reviewable under the FECA, the FEC's exercise of enforcement discretion is categorically not reviewable. *See CHGO*, 892 F.3d at 441 n.11. This characterization of the Commission's dismissal of complaints filed under the FECA misses the mark. Undoubtedly, the Commission's legal interpretation of statutory language for purposes of justifying its refusal to enforce the Act is subject to judicial review. *See*, *e.g.*, *New Models*, 993 F.3d at 886 (D.C. Cir. 2021) (panel opinion) (stating that the "analysis of statutory requirements standing alone may be amenable to judicial review"); *see also Orloski*, 795 F.2d at 161 (holding that a

dismissal is "contrary to law" if the Commission "dismissed the complaint as a result of an impermissible interpretation of the Act"). The FEC's enforcement discretion is presumptively reviewable under the FECA, not the other way around.

The only question left is whether a footnote flagging the Commission's efficient use of resources morphs an otherwise reviewable dismissal into an unreviewable one. *See* J.A. 133 n.139 ("Given the age of the activity and the fact that the organization appears no longer active, proceeding further would not be an appropriate use of Commission resources."). Even if this quip qualified as prosecutorial discretion (which is dubious), it does not affect reviewability, which depends on the ***character*** of agency action—that is, dismissal of a complaint—***not*** on the reasoning. *See Bhd. of Locomotive Engineers*, 482 U.S. at 281.

But even if the reasoning mattered for reviewability, Congress provided in the FECA that courts can review whether the Commission's reasons for exercising enforcement discretion are "contrary to law." *See Orloski*, 795 F.2d at 161 (holding that dismissal of a FECA complaint can be "contrary to law" if, even "under a permissible interpretation of the statute," the dismissal "was arbitrary or capricious, or an abuse of discretion"). After all, Congress can surely limit the permissible bases for an agency's exercise of enforcement discretion. *See Shelley v. Brock*, 793 F.2d 1368, 1374 (D.C. Cir. 1986) (holding that the Secretary of Labor "must provide an explanation for his decision that is both clear and founded

on grounds permitted by the statute or the case law" under the enabling statute); *see also Massachusetts*, 549 U.S. at 535 (holding that the EPA "must ground its reasons for action or inaction in the statute"). Because the FECA provides standards for judicial review of the FEC's exercise of enforcement discretion, the Act rebuts *Heckler*'s presumption against review of nonenforcement action.

C. The FECA's citizen-suit provision further shows that enforcement discretion decisions are reviewable.

The Act's citizen-suit provision, 52 U.S.C. § 30109(a)(8)(C), which allows "citizen suits to press plausible claims the Commission abandons," *Citizens for Resp. & Ethics in Washington v. FEC*, 923 F.3d 1141, 1144 (D.C. Cir. 2019) (Pillard, J., dissenting from denial of rehearing *CHGO* en banc), reinforces that the exercise of enforcement discretion is reviewable. The Act reflects that Congress adopted a comprehensive regime that both allows the Commission to enforce the FECA and permits private litigants to do so if the Commission refuses. Thus, the Act empowers district courts to "declare that the [Commission's] dismissal of the complaint . . . is contrary to law" and to "direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the Commission does not comply, then "the complainant may bring . . . a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

In this way, the Commission has the discretion to not investigate or to not bring a civil action based on prudential considerations. *See id.* § 30109(a)(6)(A)

(providing that the Commission "may" bring "a civil action for relief"). But the Commission's failure to investigate *after* the district court finds reason to believe a violation occurred means that a complainant *may file* "a civil action to remedy the violation[.]" *Id.* § 30109(a)(8)(C). That regime makes sense, as it allows a private litigant to enforce plausible claims that the Commission refuses to enforce based on prudential considerations or, as Congress feared, political considerations.

By contrast, the panel opinion's decision to permit unreviewable invocations of enforcement discretion at the reason-to-believe stage eliminates private litigants' ability to bring plausible claims that the Commission refuses to enforce. That is neither what the text provides nor what Congress intended, and courts are constitutionally powerless to amend the statutory review scheme by judicial fiat, which is effectively what the panel did here.

CONCLUSION

Amici respectfully request that this Court review the panel's decision en banc.

Respectfully submitted this 30th day of June, 2021.

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